No. 87-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state court may apply a general statutory provision, which requires that a plaintiff give notice of a claim against a local government before commencing suit, to bar the assertion of a Section 1983 claim by a plaintiff who failed to comply with that requirement.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case involves a State's attempt to protect itself and its municipalities from avoidable litigation and the difficulties of having to defend litigation without timely notice and opportunity to investigate the underlying claim. Wisconsin's notice-of-claim statute is not complex;

compliance is not difficult; and, in appropriate circumstances, a plaintiff may be excused from meeting its literal terms. In this case, the petitioner chose the State's courts as the forum for his Section 1983 claim, but seeks to pick and choose among the procedures applied in those courts, rejecting those that he does not like.

This Court has never squarely held that state courts are obligated to entertain suits filed under Section 1983. Without exception, the state courts have welcomed the opportunity to vindicate the constitutional rights of plaintiffs through Section 1983 actions; they have willingly opened their doors to such claims. But by their willingness to shoulder their share of the burden of Section 1983 litigation against their own employees, officers, and subdivisions, they should not be held to have abandoned their own forms of procedure, which frequently serve important local interests.

Amici believe that under our federal system, procedural variation among the States, and between federal courts and state courts, serves a useful function, reflecting the retention of state sovereignty under the federal plan. It denigrates the role of the States in the constitutional scheme to suggest that they lack the authority or the competence to develop procedural rules to aid in the resolution of disputes that may reach their courts. In particular, where constitutional rights are at issue, it has been clear from the beginning of the Republic that the Framers intended the state courts to have a primary role in the enforcement of those rights.

The States are entitled to experiment, to create what may seem to others to be idiosyncratic rules and unwise innovations. Those innovations may ultimately prove to serve well the public interest in efficient and fair dispute resolution, including constitutional claims, even if a particular plaintiff may be barred by a procedural default from litigating his claim.

This Court has never suggested that the States are obligated to hear federal claims on terms more favorable to plaintiffs than cases presenting only state claims. The proponent of a federal claim who chooses to pursue his claim in the courts of his State should not be entitled to special procedural privileges not available to other litigants in those courts. Sound policy reasons support Wisconsin's notice-of-claim provision, and there is no reason to excuse petitioner's failure to comply with that requirement, any more than any other procedural default.

Amici submit that the decision of the Wisconsin Supreme Court is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

Petitioner commenced this lawsuit in Milwaukee County Circuit Court, naming two Milwaukee police officers as defendants. Two amended complaints were filed, naming as defendants additional police officers, the Chief of Police, and the City of Milwaukee. Petitioner alleged that the defendants acted under color of state law intentionally to deprive him of his rights under 42 U.S.C. §§ 1983 and 1985(2), as well as state tort and conspiracy claims.

Petitioner did not comply with the State's notice-of-claim statute, Wisc. Rev. Stat. § 893.80. That statute provides that no action may be brought or maintained against any governmental entity or officer for acts done in an official capacity unless: (1) "within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

the party, agent or attorney is served" on the government and the officer; and (2) a claim containing a statement of the relief sought is submitted to the appropriate representative of the municipal defendant.[2]

As trial approached, respondents moved for dismissal on the basis of petitioner's failure to comply with the notice-of-claim statute. The trial court granted this motion with respect to the state law claims, but denied the motion with respect to petitioner's Section 1983 claim, finding that the notice-of-claim provision did not apply to federal civil rights claims. Instead, the court dismissed the Section 1983 claim on the alternative ground that it was barred by the statute of limitations.

Petitioner appealed that dismissal to the Wisconsin Court of Appeals; respondents cross-appealed the denial of their motion to dismiss the Section 1983 claim for failure to comply with the notice-of-claim provision. The court of appeals reversed on the statute of limitations issue, relying on *Wilson v. Garcia*, 471 U.S. 261 (1985), and affirmed on the notice-of-claim issue.

Respondents appealed that issue, and the Wisconsin Supreme Court reversed, holding that petitioner's failure to comply with Wisconsin's notice-of-claim provision barred his claim under Section 1983. The court reasoned that Wisconsin's notice-of-claim statute was a reasonable and nondiscriminatory procedural rule that did not intrude upon the substance of a Section 1983 cause of

[2] The court below rested its decision on the first requirement, the notice provision. It did not reach the second requirement. To comply with the second requirement, the claim for relief need not be submitted within any prescribed period of time; it is simply a condition precedent to bringing a lawsuit. Once the claim is filed, the municipality then has 120 days to consider and act on the claim. No suit may be brought until the municipality denies the claim or 120 days have passed, at which point the claim is deemed denied. The plaintiff then has another six months in which to bring suit.

action. The court held that, as a matter of sound state law and policy, the procedural requirements of § 893.80 were intended to apply, and did indeed apply, to constitutional claims under Section 1983. It concluded that

> litigants who choose to press their claims in state court cannot "elect" to ignore state procedural rules. The right to sue in state court is accompanied by the corollary duty to abide by certain rules and procedures. Section 893.80 is an example of just such a procedure.

Appendix to Petition (Pet. App.) A-12.

SUMMARY OF ARGUMENT

The state courts serve a fundamental role in the federal plan envisioned by the Framers, and that role is as important in connection with the resolution of constitutional claims as it is in any other field. Respect for the independence of the state courts has led this Court to reaffirm their authority to develop procedures that in the wisdom of the States may serve the interests of justice.

In Section 1983 litigation, as in other litigation, the state courts are not required to change their procedural rules because they have before them a federal cause of action; they need not follow a particular manner of dispute resolution simply because it is used by the federal courts. The States in our federal system enjoy the freedom to create procedural mechanisms to further dispute resolution as they see fit, at least in the absence of any demonstrated intent to thwart the substantive right that Congress has prescribed.

It would therefore be grave error for the Court, in the absence of a clear congressional mandate to do so, to supplant state procedures that serve legitimate state purposes. No such mandate can be found in connection with

42 U.S.C. § 1983. A careful appreciation for the history of federal civil rights legislation—in particular, Section 1983—reveals that Congress' intent there was to provide private citizens with a federal court remedy for violations of constitutional rights. Before the Reconstruction Era, the state courts had an important role—indeed, the primary role—in the adjudication and vindication of constitutional rights. That role was independent of, and at least equal to, any role played by the federal judicial system. By the Civil Rights Act, Congress sought to establish the federal courts for the first time as primary guarantors of constitutional rights, and to prescribe procedures and a cause of action in the federal courts. It was no part of Congress' plan to reform the manner of adjudicating constitutional claims in the state courts.

In States that elect to assume the burden of hearing Section 1983 claims—rather than simply adjudicating constitutional rights under their inherent remedial authority—the courts must apply the cause of action, along with its essential attributes, as Congress intended it. They cannot reshape the cause of action itself. Wisconsin's notice-of-claim statute does not do that, for it addresses an issue that is no essential part of the legal framework of the cause of action established by Congress under Section 1983.

Nor can a State claim to enforce the whole federal cause of action, but establish arbitrary procedural barriers whose effect is so antithetical to the cause of action as to preclude its actual enforcement. That also is not the case here, for Wisconsin's notice-of-claim statute serves not only important interests of the State, but the remedial purposes of Section 1983.

In short, this case concerns a procedural rule in an area in which the state courts are not compelled to follow the practice of the federal courts. It is precisely

the type of procedural rule that the States are entitled to apply in order to facilitate dispute resolution, reduce the burdens on their courts, and, in the long run, serve the interests of justice.

ARGUMENT

I. IN THE ABSENCE OF CLEAR CONGRESSIONAL DIRECTION TO THE CONTRARY, THE STATES ARE FREE TO DEVELOP THEIR OWN PROCEDURES AND APPLY THEM TO SECTION 1983 CLAIMS.

This case presents a question of this Court's regard for the competence of the States to formulate procedures designed to aid in the resolution of disputes and control litigation in their own courts.[3] The question must be ap-

[3] The case does not present the question whether state courts can refuse to entertain Section 1983 actions. On the contrary, the Wisconsin courts, like those of virtually every State, have willingly entertained Section 1983 claims. *See, e.g., Martinez v. California*, 444 U.S. 277 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980). In fact, forty-nine of the fifty States have entertained Section 1983 cases in their courts. Only in Virginia is there no reported state court decision involving Section 1983 claims. Tennessee, at one time, rejected state court jurisdiction over Section 1983, but did so on the erroneous assumption that *Congress* intended that federal court jurisdiction be exclusive. *See Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), overruled by *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1985). See generally Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 385-87 & n.15 (1984) (surveying state court decisions accepting jurisdiction over Section 1983 actions).

Petitioner submits (Brief at 14-15 n.10) that the Court also need not reach the question whether state courts are constitutionally required to entertain Section 1983 actions. *Cf. Testa v. Katt*, 330 U.S. 386 (1947). We agree that the Court need not reach that question to affirm. It is difficult, however, to conceive of a rationale by which this Court could reverse the judgment below—and thereby prohibit the imposition of a nondiscriminatory procedural rule designed to further important and legitimate state policies—without effectively mandating state courts to hear Section 1983 actions.

proached with due regard for the historical relationship between the state and federal judicial systems. Congress and this Court have long shown their fundamental concern for the continued independence of the state judiciaries.[4] Central to this concern has been the recognition that States control the procedure in their own courts and that "state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

A. State Procedural Rules, Like Wisconsin's Notice-Of-Claim Statute, Govern The Adjudication Of Federal Claims In State Court, Absent Congressional Direction To The Contrary.

From the time of the first Judiciary Act, the state courts were expected to adjudicate federal rights but were not required to use a federal code of procedure. *See generally Brown v. Gerdes*, 321 U.S. 178, 188-93 (1944) (Frankfurter, J., concurring).[5] "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev.

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[4] As Justice Frankfurter noted in a similar context:

> This is one of those small cases that carry large issues, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and the States, and more particularly the distribution of judicial power as between this Court and the judiciaries of the States.

Staub v. City of Baxley, 355 U.S. 313, 325-26 (1958) (dissenting opinion).

[5] Any other approach tends to deprive the state courts of their independent existence: "That is to say, whether they should be considered as state or Federal courts would from day to day depend not upon the character and source of authority with which they are endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering." *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 221 (1916).

489, 508 (1954). The rationale for this rule derives from fundamental principles: the ability of a State to establish procedures to govern the conduct of litigation in its own courts lies close to the core of its sovereignty. *See FERC v. Mississippi*, 456 U.S. 742, 774-75 (1982) (Powell, J., concurring and dissenting). And precisely because state control over the procedure to be used in its courts is so central to notions about the proper allocation of power between the state and federal governments, this Court has long been reluctant to read into Congress' substantive enactments an intention to upset the normal procedures that the States have established to govern their judicial systems.

There is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express Agency*, 421 U.S. 454, 464 (1975).[6] To the extent that state procedural rules serve legitimate purposes, and are applied even-handedly, the States are fully within their rights to apply their uniform rules of procedure to such claims brought in their courts.[7]

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[6] As explained below, state procedural rules may not discriminate against federal claims or be used pretextually to thwart the assertion of a federal right. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945). Nor could state procedural rules that lack legitimate purpose be used to block adjudication of a federal right. *Cf. Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (state procedural rules that lack legitimate purpose are no bar to this Court's review).

[7] Indeed, this Court has held that prisoners must comply with state procedural rules with respect to access to the writ of *habeas corpus*, which finds its origins in the Constitution itself and which, by its nature, involves the most fundamental of constitutional rights. In interpreting the federal statutes that govern the exercise of the writ, the Court has declined to find in them a congressional authorization to upset the procedural rules that ordinarily govern the conduct of cases in state criminal trials. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81-91 (1977); *Stone v. Powell*, 428 U.S. 465, 494-95 & n.37 (1976). It would be anomalous to accord Section

That failure to comply with a state procedural rule may cause a plaintiff to lose his ability to prosecute a federal claim in a given case is, of course, by itself insufficient to overcome this fundamental principle. *See Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). Indeed, whenever a state procedural rule prevents a plaintiff from asserting a federal interest, it may be argued that, in order to effectuate properly Congress' intent, state procedures must "give way" to the federal interest and its underlying policies. In such circumstances, state procedural rules are painted as arbitrary because the constitutional interest asserted appears more urgent than the more abstract and generalized policies that inform procedural rules. Notwithstanding any appearance of unfairness in an individual case, it is incontrovertible that general rules of procedure play a vital role in the efficient resolution of disputes and orderly administration of the courts. Frequently, as in this case, they serve other important state policies as well. (See Part II, *infra.*) Precisely for these reasons, and out of respect for state procedural choices, this Court has held that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978).

A plaintiff bringing his claim to the forum of his choice must take the procedures of his chosen forum as he finds them. Presumably, a Section 1983 plaintiff decides to file his case in state court because of certain procedural advantages that he perceives in the state court that are not available to him in the federal court. For example, Wisconsin courts, unlike the federal courts, allow the entry of a verdict on a vote of five out of six jurors.[8]

1983 plaintiffs greater rights in this regard than persons accused or convicted of serious crimes who are seeking to vindicate their federal constitutional rights.

[8] See Wisc. Rev. Stat. § 805.09(2).

It would be the rare Section 1983 plaintiff who objected to such a rule merely because it was different from the unanimous verdict rule applied in federal court.

In short, in choosing a state forum over a federal forum, a plaintiff must be willing to take the bad with the good. It is fundamentally anomalous to permit a plaintiff who has chosen a state forum to avoid the procedures applicable to that chosen forum, merely because those procedures defeat an asserted federal interest in the plaintiff's compensation.[9] And absent some clear indication of congressional intention to the contrary, this Court must defer to the States in connection with the administration of their dispute resolution systems. Only where Congress specifically so intends should this Court

[9] The anomaly of allowing plaintiffs to "pick and choose" among procedural rules when state courts hear federal claims was aptly summarized by Judge Taft in *Reed v. Pennsylvania Rd. Co.*, 171 Ohio St. 433, 171 N.E.2d 718 (1961), a case involving the Federal Safety Appliance Act and application of the federal "split scintilla" rule for reviewing jury verdicts:

> This court abandoned the scintilla rule years ago . . . and therefore has considerable difficulty in understanding why it should be required to apply the federal scintilla or split-scintilla rule in Ohio courts in this kind of case. . . . If [the plaintiff] elects to sue in an Ohio court, he probably does so in order to secure certain procedural advantages not available to him in a federal court. For example, he may prevail by securing the concurrence of only nine instead of all twelve jurors. . . . Furthermore, no trial judge can grant more than one new trial against him on the weight of the evidence, and no appellate court can reverse more than one judgment in his favor on the ground that it is against the weight of the evidence. . . . Also, he avoids the risk of any comment by the trial judge upon the evidence or the credibility of witnesses. . . . If the plaintiff can, by suing in an Ohio court, get these and other procedural advantages, why should he not be required to take with them those procedural disadvantages that are a part of the ordinary procedure in the courts of Ohio?

Id. at 720 n.1 (citations omitted).

endeavor to reform the application of state procedural requirements to federal causes of action.

B. Congress, When It Enacted Section 1983, Created A Remedy In The Federal Courts Without Any Intention To Supplant State Procedure And Practice When State Courts Entertain Such Actions.

Section 1983 did not create any new substantive rights. It simply provided jurisdiction and authority over constitutional claims and, with the guidance ultimately embodied in 42 U.S.C. § 1988, some direction to the district courts about adjudicating those claims.[10] In enacting

[10] In connection with federal statutory claims, this Court has occasionally held that Congress did not intend to allow certain state procedural rules to interfere with the enforcement of the right as Congress envisioned it. These cases have been limited, by and large, to situations in which (1) Congress purposefully conferred jurisdiction upon the state courts, (2) the right being enforced was uniquely of statutory creation, and (3) the state procedural rule being nullified was inconsistent with the actual substance of the plan of enforcement defined by Congress.

Thus, the Federal Employers' Liability Act ("FELA") cases that petitioner cites (Brief at 12, 18) are generally consistent with the traditional principle that the States may apply their own procedural rules to federal claims heard in their courts. With respect to FELA, Congress expressly conferred jurisdiction on the state courts in certain cases, and one of the principal features of the statutory scheme itself was its procedural reforms. So, for example, in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), the Court found that an Ohio rule concerning the allocation of factual issues between the judge and jury implicated the substance of the FELA cause of action because the jury trial right was essential to the statutory scheme as Congress envisioned it. Similarly, in *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), the Court, in exercising its authority to define the substance of the federal right created by FELA, held that the application of an antiquated Georgia rule of construction made it impermissibly difficult for a FELA plaintiff to state a cause of action in state court under that federal statute. By contrast, the Wisconsin notice provision at issue here is a purely procedural rule that has no effect whatsoever on the substantive treatment of Section 1983 cases at trial, or even in

Section 1983, Congress' concern was to provide a remedy to persons threatened with, or who had suffered, the deprivation of constitutional rights, by giving them access to the *federal* courts. *See Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). In fashioning Section 1983, Congress thus did not intend to displace long-established state court remedial schemes for adjudicating violations of constitutional rights, or to impose Section 1983's "uniquely federal remedy" upon the state courts. Rather, what was contemplated was "dual or concurrent forums in the state and federal system" (*Patsy*, 457 U.S. at 506) where the "federal remedy is supplementary to the state remedy." *Id., quoting Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The Congress that enacted Section 1983 knew well that the state courts possessed "concurrent power to enforce the Constitution of the United States within their respective limits." *See Patsy*, 457 U.S. at 507 (*quoting* Rep. Bingham). The States did not need Section 1983 to confer upon their courts the power to enforce the Constitution. The state courts had entertained suits premised upon violations of constitutional rights for decades, possessing full power and duty to give relief required by the Constitution in cases within their jurisdiction. *See, e.g., Robb v. Connally*, 111 U.S. 624, 637 (1884). Courts of equity had the power to enforce constitutional rights through injunctions. And like the federal courts, state courts of general jurisdiction presumably possessed the inherent remedial power to redress proven violations of constitutional rights in damages. *Cf. Bivens v. Six*

court. And Congress had no reason to expect any procedural reforms from the state courts that elected to try such claims.

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Indeed, the competence and duty of the state courts to decide federal questions were considerations relied upon by those who opposed the provision for a federal judiciary in the original Constitution. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1, 9-12 (2d ed. 1973).

To be sure, after the Civil War, Congress perceived a failure on the part of certain state courts adequately to enforce the civil rights laws and concluded that constitutional rights were suffering as a result of the exclusive reliance on the state courts for their enforcement.[11] Belief that there were "defects in the factfinding processes of the state courts" was apparently widespread. *See Patsy*, 457 U.S. at 506.[12] But even the reform-minded Congress of the post-Civil War era did not undertake to try to reform state court procedures in the field of constitutional adjudication. It chose instead to empower the federal judiciary to address constitutional claims, primarily through Section 1983.[13]

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[11] *See Mitchum*, 407 U.S. at 241, *quoting* Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (" 'We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i.e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts.' ").

[12] Citing Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (remarks of Rep. Stoughton); *id.* at 459 (remarks of Rep. Coburn).

[13] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983 was enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was modeled on Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. *See Mitchum v. Foster*, 407 U.S. at 238.

The Civil Rights Act of 1866, and its successor statute, the Civil Rights Act of 1871, both granted exclusive jurisdiction to the federal courts.[14] Indeed, Section 1988 itself refers only to the jurisdiction of the federal district courts, further evidence that the 42nd Congress was not concerned with enforcement of Section 1983 in the state courts. In fact, it was not until several decades later, with the enactment of the Judiciary Act of 1911, that the Congress tacitly indicated that state courts *may* entertain Section 1983 actions.[15] *See Maine v. Thiboutot*,

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[14] The 1866 Act provided "that the *district courts of the United States*, within their respective districts, shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act . . . ." Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (emphasis added). The Civil Rights Act of 1871 provided

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; *such proceeding to be prosecuted in the several district courts or circuit courts of the United States* . . . ."

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added).

[15] In contrast to the jurisdictional provisions of the Civil Rights Act of 1871, which gave the federal courts exclusive jurisdiction over Section 1983, the Judiciary Act of 1911 provided that the federal district courts shall have "original jurisdiction" over such

448 U.S. 1, 3 n.1 (1980); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

Section 1983's legislative and statutory history thus make two propositions clear. *First*, the thrust of that statute was to provide a device by which the *federal* courts could grant relief to persons who were deprived of their civil rights. The strategy of the 42nd Congress was not to alter the manner in which the state courts adjudicated constitutional rights; rather, it was to provide a *supplementary* forum. *And second*, the 42nd Congress not only did not intend to interfere with procedural perquisites of the States and their courts, but did not even contemplate that state courts would entertain Section 1983 actions *per se*.

Now that Congress no longer expressly prohibits state court jurisdiction over Section 1983 claims, it seems fair to infer that if Congress directly considered the matter, it would (1) wish to further the federal interest in the adjudication of constitutional rights by allowing Section 1983 claims to be pursued in state courts (as this Court has now held), but (2) would want to do so without impinging upon the historic interests of the States themselves,[16] including their interest in prompt resolution of

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actions. Under settled principles of federal jurisdiction, this language has been interpreted as affording concurrent jurisdiction in state and federal courts. Accordingly, this Court has interpreted the statutory and jurisdictional framework of Section 1983 as *permitting*, although not necessarily *requiring*, state court jurisdiction over Section 1983. *See Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). Clearly, history evidences no purposeful congressional intent that the States hear Section 1983 claims, let alone that they treat them in a procedurally preferential manner.

[16] Petitioner mistakenly relies (Brief at 12, 19) on *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909), for the proposition that notice-of-claim requirements are a procedural barrier that may not be applied by the *States* to federally created actions. In that case, the Court barred the application of a New Mexico *territorial* notice

disputes and the creation of techniques to aid in the resolution of claims that may reach their courts and affect their citizens. It is fully appropriate to allow state courts to take jurisdiction over Section 1983 disputes; but if Congress' overall plan is to be given effect, it is also necessary to allow the state courts a wide procedural berth in resolving those disputes.

C. The Standards Employed By This Court In Considering Questions Under Section 1988 Are Not Appropriate To This Case.

Petitioner's attempt to import the standards used under Section 1988 to decide the question presented here is unsuccessful. Indeed, the structure of Section 1988 demonstrates why Congress must be viewed as having allowed the States the freedom to establish rules such as the notice-of-claim provision at issue here.[17]

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provision in a court hearing a FELA claim in a neighboring State. The decision was plainly based on Congress' plenary power over the territories. Congress enjoys no similar "plenary" power over the States. The very existence of state sovereignty requires this Court to presume that Congress did not intend to override state procedures unless its intention to do so was manifest.

[17] In creating a federal cause of action under Section 1983 that could be heard in the federal courts, Congress did not prescribe all of the procedural details appurtenant to the statutory right: *e.g.*, the statute of limitations, rules on survivorship, or specific remedies. Instead, in 42 U.S.C. § 1988, Congress provided some guidance to the federal courts about how to "fill in" these procedural and remedial details in the absence of a clear federal rule:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the

Section 1988 was intended to allow the federal courts to "fill the gaps" in the statutory and jurisdictional framework that Congress created with the enactment of the civil rights statutes. Such gap-filling is not unusual in the context of federal statutory rights. Although federal law may establish rights, or (as here) rights of action to ease the vindication of preexisting rights, Congress does not always set forth in its statutory enactments those " 'quasi-procedural' elements that are generally considered necessary to the fair litigation of its causes of action." *See Brown v. United States*, 742 F.2d 1498, 1503 (D.C. Cir. 1984) (en banc). Thus, the federal courts are authorized to embark on the highly judgmental task of "borrowing" rules from some other source when the federal scheme is deficient. Such borrowing is limited to situations in which Congress has not specifically legislated with respect to a feature or characteristic of the customary legal framework that by "logic and tradition" invariably accompanies the existence of the right of action. *Id.* at 1505. The most frequent occasions for borrowing have been in connection with such matters as statutes of limitations, rules on survivorship, and remedies, without which the legal framework would not be complete. *See, e.g., Wilson v. Garcia*, 471 U.S. 261 (1985). In these narrow "quasi-procedural" areas, in which *some* rule is necessary to the proper adjudication of any claim, the federal courts are authorized (and, in the case of Section 1988, explicitly instructed) to engage in the quasi-

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> State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

Section 1988 thus specifically instructs federal district courts hearing Section 1983 claims to apply *state law* to fill in the interstices left by federal law, except insofar as state law is "inconsistent" with Section 1983's policies. *See Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980).

legislative and highly judgmental enterprise of curing deficiencies.[18]

That is a far different process from the adjudication by a state court of a Section 1983 claim.[19] The state court

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[18] The federal courts' limited lawmaking power is exercised reluctantly and cautiously. The federal courts' creative authority under Section 1988 has been circumscribed by the direction to draw upon existing state law rules to fill deficiencies where possible. Where state law rules do not accomplish that task, the federal courts are authorized, in effect, to select some other rule that will do so.

[19] Petitioner's suggestion (Brief at 31 n.22) that this Court decided in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that the "choice of law" provisions of 42 U.S.C. § 1988 apply in state courts is incorrect. In *Sullivan*, the Court held that there is an implied right to damages for violations of 42 U.S.C. § 1982, reasoning that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." 396 U.S. at 239. The Court did not, however, specifically reach the issue of how the state court was to determine damages because the issue of damages had not been litigated below. *Id.* at 240. *See also id.* at 256 & n.33 (Harlan, J., dissenting). Although the Court suggested in dicta that the rule of damages to be applied was governed by "federal standards, as provided by Congress in 42 U.S.C. § 1988" (*id.* at 239), a holding to that effect in some future case could be supported by the rationale that a uniform rule of damages must be applied in state and federal courts because a rule of damages is so central to the Section 1982 claim. The dictum in no way suggests, however, that the state courts should follow the same "choice of law" analysis as do the federal courts. As we show below, that would make little sense given the full array of procedural and remedial rules already in place in the state courts.

Indeed, Section 1988 could not apply by its terms in the state courts. It requires that the federal district courts first look to federal law and procedure—before any "choice of law" question even arises. The state court cannot be required to look first at federal procedure; that would turn state courts into mirrors of the federal courts. They must look first to their own law and procedures. It is only with respect to the definition of the underlying substantive right, and those quasi-procedural aspects of the right that are an essential part of the legal framework associated with that right, that uniformity between federal and state courts

has available a full panoply of procedural rules and statutes that it applies on a daily basis to claims that come before it. In connection with most of the procedural decisions that it will make, its role is not to exercise quasi-legislative discretion, but simply to apply the rules that the state legislature has prescribed. Unlike the federal courts, which must choose rules in applying Section 1988, the question confronting a state court in a situation such as the one presented here is whether the rules that it ordinarily applies must be abandoned.

Section 1988's only relevance to this case is that it emphasizes the fallacy of two arguments. *First*, it demonstrates that uniformity was not a primary concern of Congress in enacting Section 1983. If Congress could tolerate significant variations in even the central "quasi-procedural" rules as between the federal courts in different States—the inevitable result of the instruction to a federal court to draw guidance from the particular State in which it sits—it could certainly tolerate the usual variations, as between state and federal courts, in non-central areas of procedure. *Second*, the instruction to the federal courts to resort to state law in the first instance to fill the deficiencies in the federal scheme shows that even in the post-Civil War era, Congress retained its basic faith in the States and their ability to create rational rules worthy of application to the civil rights laws.

II. WISCONSIN'S NOTICE-OF-CLAIM STATUTE IS NOT ANTITHETICAL TO THE FEDERAL CLAIM, AND SERVES LEGITIMATE PURPOSES CONSISTENT WITH SECTION 1983.

Drawing first on the traditional rule that "federal law takes the state courts as it finds them," and second, upon the knowledge that Section 1983 was not intended to

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is required. Consistency in remedies—like consistency in the choice of statutes of limitations, survivorship rules, or entitlement to attorney's fees—may fall into the category of quasi-procedural rules upon which uniformity is required.

reform state court procedures, *amici* suggest that state court procedures apply to Section 1983 claims unless the state court has failed to apply the "entire cause of action" established by Congress; or the state court procedural rule in question is so antithetical to the purposes of Section 1983 that it effectively destroys the federal claim. Wisconsin's notice-of-claim requirement does not diminish the Section 1983 cause of action, and it serves important state interests that are fully consistent with the purposes of Section 1983.

A. In Applying A Notice-Of-Claim Requirement To Section 1983 Litigation, The Wisconsin Courts Do Not Thereby Fail To Hear The Entire Cause Of Action As Defined By Congress.

It is beyond serious dispute that state courts are not at liberty, under the guise of procedural rulemaking, to reshape the Section 1983 cause of action established by Congress. State courts must hear "the entire federal cause of action" (Pet. Brief at 14), and are not free to accept those aspects of the congressionally created cause of action that they like, and reject those that they do not like. The issue, then, is what are the essential attributes of the cause of action.

Whatever Congress has specifically included in the Section 1983 right is obviously "essential." To deny any part of that would be inconsistent with the federal cause of action. Thus, an entitlement to damages and injunctive relief, as [illegible] the availability of attorney's fees to prevailing Section 1983 plaintiffs, are at the core of the cause of action.[20] Moreover, in light of the procedural

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[20] In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that the availability of attorney's fees under Section 1988 applies to Section 1983 actions brought in the state courts. *Id.* at 8-11. That decision, however, turned on the legislative history of the Attorney's Fees Awards Act of 1976, and not Section 1983. *See id.* at 9-11 ("Representative Drinan described the purpose of the Civil Rights Attorney's Fees Awards Act as 'authoriz[ing] the award of a reasonable attorney's fee in actions brought in State or Federal courts.'").

and remedial omissions in Section 1983, and Congress' instruction to the federal courts to fill in the essential legal parameters, Section 1983's cause of action may also include certain of the "quasi-procedural" attributes of the right that are so inextricably bound up with the cause of action as to require uniform application. Thus, for example, a uniform federal rule of decision regarding the type (although not the length) of statute of limitations applicable to Section 1983 actions (*see Wilson v. Garcia*, 471 U.S. 261 (1985)), may well be so much a part of the substance of a Section 1983 right as to mandate its application in state courts.

Here, by contrast, although federal courts do *not* apply notice-of-claim rules to Section 1983 litigation, this feature of federal court 1983 practice is not an essential part of the cause of action itself. Notice statutes are of a different order than the cause of action itself or those quasi-procedural rules that are essential to the legal framework and without which the legal framework is deficient. They are among the vast body of procedural rules, rooted in policies unrelated to the definition of any particular substantive cause of action, that forms no essential part of "the cause of action" as applied to any given plaintiff. The issue of such notice is simply not close to the core of the legal framework that Congress expressly established, and which it instructed the federal courts to elaborate in Section 1988. For this reason, it cannot be said that, in applying a notice requirement to Section 1983 claims asserted in their courts, the States are thereby failing to apply the entire federal cause of action as Congress has defined it.[21]

[21] Section 1983 adjudication is not "deficient" without some notice-of-claim rule. *See Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc). Thus, the federal courts need not reach out to adopt such a rule. If the Section 1983 cause of action were viewed as deficient without some form of rule on notice-of-claim, *amici* would suggest in that case that the federal courts must borrow the notice-of-claim statute of the State in which they sit. *See id.* at 1512 (Bork, J., dissenting).

Rules that serve legitimate state purposes in dispute resolution are not likely to bar a state court from hearing the entire cause of action as Congress intended it. Such rules serve purposes collateral to the substantive entitlement to vindicate the underlying claim. For example, requiring mediation or non-binding arbitration for all civil damages cases might reduce the burden on the judiciary and lessen the expense to litigants who settle their claims through such offices, and make them better prepared if they elect to go to trial. If a State adopted such programs, and found them successful, it would make little sense to ignore the state procedural policies that underlie such rules, and that confront every other litigant in the State, by excusing Section 1983 plaintiffs from compliance. The mere fact that the rule would add a step to the process of bringing a claim to trial in the state court would not transform the underlying cause of action as Congress intended it to be applied.

In a similar vein, *amici* suggest that exhaustion of administrative remedies may be a requirement that the state courts might apply to Section 1983 actions (provided it was uniformly applied to *all* causes of action litigated in state courts), even while the federal courts operate under a different rule. In holding, in *Patsy*, that exhaustion of administrative remedies cannot be a procedural prerequisite to a Section 1983 suit in federal court, this Court relied on the suggestion in the legislative history, and in Congress' subsequent actions, that "immediate access to [the federal] courts" was near the core of congressional concern. 457 U.S. at 504-05. But whatever Congress' specific intent that might allow the federal courts to ignore state administrative procedures in taking jurisdiction of civil rights claims, it is quite another thing to require the state courts to ignore their own procedural practices, if the States' legislatures have weighed these close questions of policy differently.[22] The Court would

[22] In *Patsy*, several members of this Court noted the various sound policy reasons that might lead one to conclude that exhaus-

have to consider long and hard whether exemption from exhaustion of administrative remedies is so much a part of the legal framework of Section 1983 that it must be carried over into the state courts, or whether the "no exhaustion" rule is more aptly considered simply part of the procedural background of adjudication in the federal court and upon which strict uniformity in the state courts is not required.

Exhaustion of administrative remedies may be the hard case; this case, involving only a notice of claim, is not. Because the substantive scope of Section 1983 is not dependent on the existence or non-existence of certain forms of procedural practice, such as those embodied in notice-of-claim statutes, and because procedural experimentation and reform by the States serves a valuable function, the States should be free to apply such rules to the extent that they rest on otherwise valid procedural policies.

B. Wisconsin's Notice-Of-Claim Provision Is A Nondiscriminatory Procedural Rule That Serves Legitimate And Reasonable State Interests Consistent With The Purposes Of Section 1983.

Procedural requirements must be expressions of legitimate state policy; may not frustrate the vindication of federal claims; and may not discriminate against the federal right *vis-a-vis* analogous state rights. As shown below, notice-of-claim provisions are not antithetical to Section 1983, in either purpose or effect. On the contrary, notice provisions serve the underlying purposes of the statute by, among other things, facilitating settlement and permitting the State the opportunity to remedy ongoing wrongs.

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tion of administrative remedies would be advantageous. *See* 457 U.S. at 516-17 (O'Connor, J., concurring); *id.* at 518 (White, J., concurring).

Wisconsin's notice-of-claim statute, like similar statutes in most other States, is bottomed on sound judgments regarding the special problems that local governments face in dealing with numerous claims.[23] The Wisconsin provision applies to all actions brought against municipal governments in the State, whether under federal or state law, and there is no suggestion that it has not been applied even-handedly and without discrimination against federal causes of action.[24] Compliance with the statute is not difficult: typically, a simple document that recites the facts giving rise to the injury and that indicates an intent on the plaintiff's part to hold the City responsible for any resulting damages will suffice. *See* Pet. App. A14.[25] More important, the purposes for notice-of-claim laws

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[23] Petitioner's attempt (Brief at 27-30) to link notice-of-claim provisions with assertions of state sovereign immunity from federal law is misguided. To the contrary, the statutes are an integral part of the States' expansion of governmental tort liability. Having eliminated immunity, the States became aware that local bodies could be inundated with claims for which procedures to manage, investigate, and process in an orderly and efficient manner did not exist. Notice-of-claim statutes are part of the procedures subsequently adopted to meet these concerns. They are not intended as arbitrary procedural hurdles designed to trap unwary plaintiffs; they legitimately address the special needs of local government bureaucracies in handling claims engendered by the very existence of municipal liability.

[24] Relying on the express language of Section 893.80, the Wisconsin Supreme Court has held that the notice requirement applies to "*any* cause of action." *See Figgs v. City of Milwaukee*, 121 Wis.2d 44, 357 N.W.2d 548 (1984) (emphasis in original), quoted in the decision below. Pet. App. A-9 n.3.

[25] Petitioner overstates the "burden" of complying with Section 893.80. See Brief at 25-27. Wisconsin courts have been lenient in applying § 893.80 and its predecessors, and have repeatedly held that only substantial, rather than strict, compliance is required to satisfy the statute. *See Gutter v. Seamandel*, 103 Wisc.2d 1, 308 N.W.2d 403, 408 (1981), *citing Novak v. Delavan*, 31 Wis.2d 200, 143 N.W.2d 6 (1966).

are not pretextual; such laws are a near universal response of state legislatures to the problems that arise when a government entity is a potential defendant in a lawsuit.[26] A number of interconnecting reasons, defined over several decades, support deference to the States' judgments in enacting these provisions.

First, early notice serves remedial purposes consistent with the public interest embodied in the civil rights statutes. Notice may publicize violations and provide government officials the opportunity to implement curative measures that will avoid successive injuries. Local government agencies are frequently large bureaucracies. Through early notice, a state or local government may timely learn of the existence of a deficiency in its plan of constitutional enforcement, or in the constitutional education of employees, and implement a corrective plan. Thus, the public interest is best served when notice-of-claim requirements force the disclosure of unlawful conditions or practices sooner rather than later.

Second, prompt notice permits local governmental entities an opportunity to investigate the factual circumstances surrounding a claim. By "compel[ling] notice . . . the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement." *Brown v. United States*, 742 F.2d at 1506.[27] The

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[26] As the Appendix to this brief indicates, the legislatures of the various States have been active in fashioning and re-fashioning notice-of-claim statutes. At least thirty-seven States currently have some type of notice statute or, alternatively, a statute allowing localities to devise their own notice-of-claim requirements. The remaining States have exercised their discretion, either through their legislatures or their courts, to handle these problems differently.

[27] *See also Brown v. United States*, 742 F.2d at 1516 (Bork, J., dissenting); *Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *Fraser v. Henninger*, 173 Conn. 52, 376 A.2d 406, 409 (1976); *DeKine v. District of Columbia*, 422 A.2d 981, 985 (D.C. 1980); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425

ability to obtain accurate information about an event declines over time. Witnesses' memories fade, and the physical surroundings of an incident may substantially change between the time of an event and its investigation. Investigation is likely to be more effective closer to the time of the incident giving rise to a cause of action.

Effective investigation yields tangible benefits to both claimants and defendants. An accurate factual picture of an incident enables the municipality to assess the extent of its potential liability and the validity of the complaint against it, and make an appropriate response. If the investigation discloses fault, the municipality can provide immediate compensation to the complainant, preferably before any suit is filed. If litigation results, settlement is more likely if factual matters are clear.

Third, notice-of-claim statutes are generally conducive to prompt and amicable settlements, with far less expense to both parties and less burden on the courts (to the benefit of all litigants).[28] Where settlement is not possible,

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(1984); *Dukes v. City of Louisville*, 425 S.W.2d 110, 112 (Ky. 1967); *George v. Town of Saugus*, 394 Mass. 40, 474 N.E.2d 169, 171 (1985), *Kustasz v. Detroit*, 28 Mich. App. 312, 184 N.W.2d 328 (1971), *Quinn v. Graham*, 428 S.W.2d 178, 184 (Mo. App. 1968); *Navarro v. Rodriguez*, 202 N.J. Super. 520, 495 A.2d 476 (1984); *423 So. Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 71 (1986); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Artco-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Heller v. Virginia Beach*, 213 Va. 683, 194 S.E.2d 696, 698 (1973); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238, 1252 (1975).

[28] *See, e.g., Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *DeKine v. District of Columbia*, 422 A.2d 981, 985 (D.C. 1980); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425 (1984); *Dukes v. City of Louisville*, 425 S.W.2d 110, 112 (Ky. 1967); *Langevin v. City of Biddleford*, 481 A.2d 495, 497 (Me. 1984); *George v. Town of Saugus*, 394 Mass. 40, 474 N.E.2d 169, 170 (1985); *Navarro v. Rodriguez*, 202 N.J. Super. 520, 495 A.2d 476 (1984); *423 So. Salina St. v. City of Syracuse*, 68 N.Y.2d

notice-of-claim provisions may reduce the burden of litigation by reducing the burden of discovery. These benefits similarly are not restricted to governmental defendants; the costs and delay of formal adjudication fall hard on both plaintiffs and defendants.

Fourth, notice-of-claim provisions are important to accurate and responsible fiscal planning by local governments.[29] The existence of latent claims can wreak havoc on municipal budgets and jeopardize necessary government services. Moreover, fiscal planning requires more than the ability to pay a claim in a particular case. To the extent that the same condition or similar incidents may give rise to further claims, notice of one claim may alert the municipality to an entire class of potential liabilities and expenses.[30]

474, 503 N.E.2d 63, 72 (1986); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Arteo-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Heller v. Virginia Beach*, 213 Va. 683, 194 S.E.2d 696, 698 (1973).

[29] *See, e.g., Antonopoulus v. Telluride*, 187 Colo. 392, 532 P.2d 346, 349 (1975); *Fraser v. Henninger*, 173 Conn. 52, 376 A.2d 466, 409 (1976); *Rio v. Edward Hospital*, 104 Ill.2d 354, 472 N.E.2d 421, 425 (1984); *Quinn v. Graham*, 428 S.W.2d 178, 184 (Mo. App. 1968); *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W. 2d 339, 343 (1976); *Bessette v. Enderlin School Dist. No. 22*, 288 N.W.2d 67, 71 (N.D. 1980); *Reirdon v. Wilburton Bd. of Education*, 611 P.2d 239, 240 (Okla. 1980); *Arteo-Bell v. City of Temple*, 616 S.W.2d 190, 192 (Tex. 1981); *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238, 1252 (1975).

[30] A private defendant may face similar threats to its financial stability, and may indeed be forced out of business, by adverse damage awards. The public interest in stable local governments and the vital services that they provide preclude forcing government entities out of business. Moreover, because the taxpaying public bears the cost of damage awards, the public interest requires that they be reduced or avoided if at all possible. These clear differences between public defendants and private defendants justify their different treatment under notice-of-claim statutes.

Fifth, because the actions which may serve as a predicate for Section 1983 claims are sometimes insured risks, notice-of-claim provisions serve an important function in controlling liability insurance costs. High damage awards against local governments have led to a crisis in the municipal liability insurance industry. The increased cost of municipal insurance has forced many local governments to curtail public services or cancel programs because they cannot afford the insurance premiums necessary to cover those activities. Some local governments have had trouble obtaining insurance under any circumstances. In order to control insurance premiums local governments must take immediate remedial measures that only early notice allows. In addition, early notice of a claim permits municipalities and their insurance carriers to assess coverage questions prior to the inception of litigation. Frequently, prompt coverage determinations help to facilitate the settlement of claims.

In short, the notice-of-claim provision at issue here serves important state purposes and is entirely consistent with the desire for prompt and fair resolution of meritorious constitutional claims. Although it may, on occasion, adversely affect a particular plaintiff, its objectives are fully compatible with the purposes of Section 1983 itself.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Thirty-seven States and the District of Columbia currently have some form of notice-of-claim provision for claims against state or local government:

Ala. Code §§ 11-47-23, 11-47-192 (1975).

Ariz. Rev. Stat. Ann. § 12-821 (1982 & Supp. 1987).

Ark. Stat. Ann. §§ 12-2901 through 12-2903 (1968 & Supp. 1986).

Cal. Govt. Code § 911.2 (West 1980 & Supp. 1987).

Colo. Rev. Stat. § 24-10-109 (1973 & Supp. 1986).

Conn. Gen. Stat. Ann. § 7-465 (West 1972 & Supp. 1987).

Del. Code Ann. tit. 10, § 4013 (Supp. 1986).

D.C. Code Ann. § 12-309 (1981).

Fla. Stat. Ann. § 768.28 (West 1986).

Ga. Code Ann. § 36-33-5 (1987).

Idaho Code § 6-905 *et seq.* (1979 & Supp. 1987).

Ind. Code § 34-4-16.5-1 *et seq.* (1986).

Ky. Rev. Stat. Ann. § 411.110 (Michie 1970).

Me. Rev. Stat. Ann. tit. 14, § 8107 (1980).

Md. Cts. & Jud. Proc. Code Ann. § 5-306 (1984 & Supp. 1986).

Mass. Gen. Laws ch. 258, § 4 (1958 & Supp. 1987).

Mich. Comp. Laws Ann. § 691.1404 (West 1987).

Minn. Stat. Ann. § 466.05 (West 1986).

Mo. Ann. Stat. § 77.600 (Vernon 1987).

Neb. Rev. Stat. § 23-2401 *et seq.* (1983 & Supp. 1986, 1987).

N.H. Rev. Stat. Ann. § 541-B:16 (1974 & Supp. 1986).

N.J. Rev. Stat. Ann. § 59:8-3 *et seq.* (West 1982).

N.M. Stat. Ann. § 41-4-16 (1978).

N.Y. Gen. Mun. Law § 50-e (McKinney 1986).

N.C. Gen. Stat. § 143-291 *et seq.* (Supp. 1986).

Okla. Stat. Ann. tit. 51, § 156(B) (West 1978 & Supp. 1987).

Or. Rev. Stat. § 30.275 (1984).

R.I. Gen. Laws § 45-15-9 (1980 & Supp. 1986).

S.C. Code Ann. § 15-78-10 *et seq* (Law. Co-op. Supp. 1986).

S.D. Codified Laws Ann. § 3-21-1 *et seq.* (1985 & Supp. 1987).

Tenn. Code Ann. § 29-20-301 *et seq.* (1980).

Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986).

Utah Code Ann. § 63-30-111 (1986 & Supp. 1987).

Vt. Stat. Ann. tit. 19, § 1373 (1975 & Supp. 1986).

Va. Code Ann. § 8.01.195.6 (1984 & Supp. 1986).

Wash. Rev. Code Ann. § 35.31.020 (1960 & Supp. 1987).

Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986).

Wyo. Stat. § 1-39-113 (1977 & Supp. 1987).

Four other States apply special statutes of limitation to claims made against government entities:

Miss. Code Ann. § 11-46-1 *et seq.* (Supp. 1987).

N.D. Cent. Code § 32-12.1-10 (1976 & Supp. 1987).

Ohio Rev. Code Ann. § 2743.16 (Baldwin Supp. 1986).

W.Va. Code § 29-12-A-1 *et seq.* (1986 Supp.).

Notice-of-claim provisions have been the focus of much recent legislative scrutiny. Legislatures in at least twenty States have reconsidered their notice-of-claim provisions in the last ten years,[1] yet the provisions have been repealed in only two States.[2] In some cases a single State has made repeated amendments to its statute.[3]

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[1] Arizona, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Nebraska, New Hampshire, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming.

[2] Illinois and Kansas.

[3] See, *e.g.*, Tex. Rev. Civ. Stat. Ann. art. 6252-19, § 16 (Vernon Supp. 1985) (repealed, subject matter now found at Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986)), amended prior to repeal in 1971, 1973, 1983; N.H. Rev. Stat. Ann. § 541-B:16 (1974 & Supp. 1986) (added in 1977, amended in 1985).